

A AmBank (M) Bhd v Hexagon Distributors Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-252-02 OF
2013

B ABU BAKAR JC
6 AUGUST 2013

C *Civil Procedure — Summary judgment — Application for — Banking facilities — Default in repayment — Triable issues — Whether raised — Whether summary judgment ought to be entered — Rules of Court 2012 O 14 r 1*

D This was an application for summary judgment where the plaintiff, a bank, asserted against the defendants, being borrower and guarantor, that there were no triable issues for full trial of the bank's claim for the repayment of banking facilities provided. In this case, upon request by the first defendant, the plaintiff granted to the former, general banking facilities in the form of among others; **E** (i) bankers acceptance ('BA'); and (ii) trust receipt ('TR'). The second defendant was the guarantor to the said facilities. Subsequent to the default by the first defendant in repayment of the facilities, the plaintiff issued two letters of demands over the outstanding payments due for them. The defendants replied to the first demand letter pleading for time as Corporate Debt Restructuring Committee ('CDRC'), a body formed by Bank Negara to assist in the restructuring of companies debt, was considering its own debt restructuring. The plaintiff in this case claimed, inter alia, the outstanding amount for the BA and TR facilities. The plaintiff submitted that the agreements signed by the defendants on the facilities given including the guarantees and the reply by the defendants to the letters of demand not **F** disputing the same as well as the lack of credible defence, proved that summary judgment should be entered against the defendants. The defendants however submitted that this was not a suitable case for summary judgment as there were triable issues as follows: (i) CDRC was in the midst of looking into the first defendant's debt restructuring; (ii) the facilities were changed to another type of facility namely 'short term facility' unilaterally by the plaintiff and therefore **G** without the consent of the defendants; (iii) there was no explanation in the letters of demand as to how the outstanding amount had accrued; and (iv) there was no consideration when the second defendant became guarantor. **H**

I **Held**, allowing the plaintiff's application with costs of RM3,000:

- (1) The intention of the parties were to be found in the written contract itself and when the contract is plain in meaning, the effect of the words in the same must be recognised. In this case, the agreements signed and agreed by both parties clearly stipulate the defendants' obligations in meeting

- the demands made by the plaintiff for the facilities that had been provided. As the defendants had failed to dispute the two demand letters that were sent to them, the defendants were estopped from denying the claim of the plaintiff (see paras 12, 14 & 16). A
- (2) As the certificate of indebtedness had already been issued, the burden was shifted to the defendants to disprove the claim. In this regard, the defendants had failed to prove that no outstanding amount was due as the defendants had not disputed the two demand letters received from the plaintiff. It was further noted that while the defendants assert that there were no outstanding payments due to the plaintiffs for the facilities granted, the defendants had also maintained that the debt due was being taken over by CDRC. That in itself was contradictory for the defendants to say as if indeed there was no outstanding amount due, it would not be necessary for the CDRC to take a role in trying to resolve the issue of debt for the defendants. Further, the defendants in their letter to the plaintiff's demand admitted that the defendants were attempting to restructure its debts. This again was a clear indication to the court that the defendants did not have any credible defence to the plaintiff's claim that no triable issues could be discerned in this case (see paras 19, 21–24). B C D
- (3) The assertion of the defendants that the types of facilities were unilaterally changed by the plaintiff was an afterthought to create issues for trial. There was no evidence that the type of facilities were indeed changed as the letter of demands did not refer to the facilities being changed to 'short term facility' as alleged by the defendants. Since the defendants did not consent to the same, the type of facilities was never changed as shown by contemporaneous documents (see paras 25 & 28). E F
- (4) The consideration given for the second defendant to be guarantor were the facilities provided for by the plaintiff and the second defendant could never deny being guarantor for the facilities as it had signed and agreed to two irrevocable and unconditional guarantees (see para 29). G

[Bahasa Malaysia summary]

Ini merupakan satu permohonan untuk penghakiman terus di mana plaintif, sebuah bank, mendakwa defendan-defendan, sebagai peminjam dan penjamin, bahawa tiada isu untuk dibicarakan untuk perbicaraan penuh tuntutan bank untuk pembayaran balik kemudahan perbankan yang diberikan. Di dalam kes ini, atas permintaan defendan pertama, plaintif telah memberikan kepada defendan pertama kemudahan perbankan am di dalam bentuk, antara lainnya; (i) penerimaan jurubank ('PJ'); dan (ii) penerimaan amanah ('PA'). Defendan kedua merupakan penjamin kepada kemudahan tersebut. Berikutan kemungkiran defendan pertama dalam membayar balik kemudahan, plaintif mengeluarkan dua surat tuntutan terhadap bayaran tertunggak yang perlu dibayar kepada mereka. Defendan-defendan membalas H I

- A surat tuntutan pertama memplid untuk masa memandangkan Jawatankuasa Penyusunan Hutang Korporat ('JPHK'), sebuah badan yang ditubuhkan oleh Bank Negara untuk membantu dalam menyusun semula hutang syarikat, sedang mempertimbangkan menyusun semula hutangnya sendiri. Plaintif dalam kes ini mendakwa, antara lainnya, jumlah tertunggak untuk kemudahan
- B PJ dan PA. Plaintif berhujah bahawa perjanjian yang ditandatangani oleh defendan-defendan mengenai kemudahan yang diberikan adalah termasuk jaminan dan balasan oleh defendan-defendan kepada surat tuntutan tidak mempertikaikan perkara tersebut, begitu juga dengan kekurangan pembelaan yang boleh dipercayai, membuktikan bahawa penghakiman terus seharusnya
- C dimasukkan terhadap defendan-defendan. Defendan-defendan bagaimanapun berhujah bahawa ini bukanlah kes yang sesuai untuk penghakiman terus memandangkan terdapat isu boleh dibicarakan seperti berikut: (i) JPHK sedang mengkaji penyusunan semula hutang defendan pertama; (ii) kemudahan-kemudahan diubah kepada satu lagi jenis
- D kemudahan iaitu 'kemudahan jangka pendek' secara unilateral oleh plaintif dan oleh itu tanpa kebenaran defendan-defendan; (iii) tiada penjelasan di dalam surat tuntutan mengenai bagaimana jumlah yang tertunggak terakru; dan (iv) tiada pertimbangan apabila defendan kedua menjadi penjamin.
- E **Diputuskan**, membenarkan permohonan plaintif dengan kos sebanyak RM3,000:
- (1) Tujuan pihak-pihak boleh didapati di dalam kontrak bertulis itu sendiri dan apabila kontrak tersebut jelas maknanya, kesan perkataan-perkataan di dalam kontrak tersebut perlu diiktiraf. Di dalam kes ini, perjanjian
- F yang ditandatangani dan dipersetujui oleh kedua-dua pihak jelas menyatakan kewajipan defendan-defendan dalam memenuhi tuntutan yang dibuat oleh plaintif untuk kemudahan yang telah diberikan. Memandangkan defendan-defendan gagal untuk mempertikaikan dua
- G surat tuntutan yang dihantar kepada mereka, defendan-defendan diestop daripada menafikan tuntutan plaintif (lihat perenggan 12, 14 & 16).
- (2) Memandangkan sijil keberhutangan telah pun dikeluarkan, beban beralih kepada defendan-defendan untuk menyangkal tuntutan tersebut. Sehubungan dengan ini, defendan-defendan gagal untuk membuktikan
- H bahawa tiada jumlah tertunggak perlu dibayar memandangkan defendan-defendan tidak mempertikaikan dua surat tuntutan yang diterima daripada plaintif. Seterusnya dibuktikan bahawa semasa defendan-defendan menegaskan bahawa tiada bayaran tertunggak yang
- I perlu dibayar kepada plaintif untuk kemudahan yang diberikan, defendan-defendan juga mengekalkan bahawa hutang yang perlu dibayar diambil alih oleh JPHK. Itu dengan sendirinya bercanggah bagi defendan-defendan untuk mengatakan sekiranya memang tiada jumlah tertunggak yang perlu dibayar, adalah tidak perlu untuk JPHK mengambil peranan dalam mencuba menyelesaikan isu hutang untuk

defendan-defendan. Seterusnya, defendan-defendan di dalam surat mereka kepada tuntutan plaintif mengakui bahawa defendan-defendan cuba untuk menstruktur semula hutang-hutang mereka. Ini sekali lagi merupakan petunjuk jelas kepada mahkamah bahawa defendan-defendan tidak mempunyai pembelaan yang boleh dipercayai kepada tuntutan plaintif bahawa tiada isu boleh dibicarakan yang boleh diputuskan di dalam kes ini (lihat perenggan 19, 21–24).

- (3) Dakwaan defendan-defendan bahawa jenis-jenis kemudahan diubah oleh plaintif secara unilateral merupakan sesuatu yang difikirkan kemudian untuk mereka isu untuk perbicaraan. Tiada keterangan bahawa jenis kemudahan tersebut sememangnya diubah memandangkan surat tuntutan tidak merujuk kepada kemudahan diubah kepada 'kemudahan jangka pendek' seperti yang didakwa oleh defendan-defendan. Memandangkan defendan-defendan tidak bersetuju kepada perkara sedemikian, jenis-jenis kemudahan tidak pernah diubah seperti yang ditunjukkan oleh dokumen-dokumen semasa (lihat perenggan 25 & 28).
- (4) Pertimbangan yang diberikan kepada defendan kedua untuk menjadi penjamin merupakan kemudahan-kemudahan yang diperuntukkan oleh plaintif dan defendan kedua tidak boleh menafikan menjadi penjamin kepada kemudahan-kemudahan kerana ia telah menandatangani dan bersetuju kepada dua jaminan yang tidak boleh ditarik balik dan tanpa syarat (lihat perenggan 29).]

Notes

For cases on application for summary judgment, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8443–8501.

Cases referred to

- Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 14, SC (folld)
- Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 297, FC (folld)
- Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
- Dawson's Bank Ltd v Nippon Menkwa Kabushiki Kaisha* 62 1A 100, HC (refd)
- Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357; [2003] 4 CLJ 294, CA (folld)
- Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995, HC (folld)

Legislation referred to

- Rules of Court 2012 O 14 r 1
Rules of the High Court 1980 O 14

A

*SH Au (Amin Tan & Co) for the plaintiff.
Alfred Lai (Gideon Tan Razali Zaini) for the defendants.*

Abu Bakar JC:

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THE BACKGROUND

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[1] Enclosure 7 is the application for summary judgment under O 14 r 1 of the Rules of Court 2012 where the plaintiff, a bank asserts against the defendants being borrower and guarantor that there are no triable issues for full trial for the bank's claim for the repayment of banking facilities provided and this application was heard on 15 July 2013. I now give my decision on this application and its reasons.

D

THE MATERIAL FACTS

[2] Upon request by the first defendant, the plaintiff granted to the former, general banking facilities in the form of among others:

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- (a) bankers acceptance ('BA'); and
- (b) trust receipt ('TR').

F

[3] Two agreements similarly entitled 'General Agreement By Customer(s)' were signed by the plaintiff and first defendant on 25 January 2003 and 9 April 2007 for the facilities and the relevant clause in both agreements is cl 1(A) which reads:

G

In consideration of ..., hereafter called (the 'Bank', which expression shall where the context so admits include its successors and assigns) opening or continuing my/our account (s) with the Bank or from time to time making or continuing advances to me/us or negotiating on my/our behalf bill of exchange and/or invoices or other documents representing or relating to goods or opening or establishing at my/our request such documentary or other credits as the Bank may think fit or providing other banking services and accommodation for me/us or any of us or for such other person, firm or company at my/our request as the Bank may think fit, I/we

H

HEREBY AGREE AND UNDERTAKE with the Bank as follows:

Payment

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All moneys, obligations and liabilities whether actual or contingent now or at any time hereafter due, owing or incurred to the Bank by me/us in respect of any of the facilities made available by the Bank for me/us or transactions undertaken by the Bank for me/us as aforesaid on any account whatsoever (whether alone or jointly and whatever style, name or form and whether as principal or surety) *shall be repaid by me/us immediately on demand together*

with to date of repayment at such rates and upon such terms as may from time to time be payable, commissions, fees and other charges and all expenses incurred by the Bank in relation to me/us or the preparation or enforcement of any guarantees or security for any moneys, obligations or liabilities as aforesaid including legal and cost on a full indemnity basis. (Emphasis added.)

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[4] The second defendant is the guarantor to the facilities provided who likewise signed two agreements similarly known as 'guarantee' on the same dates as the agreements signed by the plaintiff with the first defendant and the relevant clause is cl 1 which states:

C

As in inducement to and in consideration of ... (hereafter called 'the Bank' which expression shall where the context so admits include the Bank's successors and assigns) making or continuing advances as forbearance or otherwise giving credit or affording banking facilities for as long as the Bank may think fit or granting time to HEXAGON DISTRIBUTORS SDN BHD (240911-M) of ... (hereafter called 'the Customer') at my/our request, I/we hereby *irrevocably and unconditionally guarantee* jointly and severally to the Bank the *payment of and undertake upon demand* being made to me/us or any of us by the Bank to pay and satisfy to the Bank forthwith all money or liability whether actual certain or contingent or hereafter owing or incurred or due and unpaid to the Bank anywhere on any account whatsoever whether from the Customer solely or from the Customer jointly with any other person or persons or from any firm in which the Customer may be a partner including the amount of notes or bills discounted or paid and other loans credits or advances made to or for the accommodation or at the request either of the Customer solely or jointly with any other person and in whatever name style or firm or of any such firm as aforesaid or for any money for which the Customer may be liable as principal or surety or in any other way whatsoever including:-

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E

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(a)(b) ... together with the rate(s) of interest as stipulated in the letter of offer together with any variation thereto from time to time an all debts and liabilities aforesaid to the date of payment commission banking charges legal and other costs charges and expenses occasioned by or incident to this or any other security held by or offered to the Bank for the same indebtedness or by or to the enforcement of any such security. (Emphasis added.)

G

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[5] Subsequent to the default by the first defendant in repayment of the facilities, it is not disputed that both the defendants received two demand letters dated 23 January 2013 and 13 February 2013 issued by the plaintiff for the outstanding payments due for the same.

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[6] The defendants replied to the first demand letter by the letter dated 4 February 2013 pleading for time as Corporate Debt Restructuring Committee ('CDRC'), a body formed by Bank Negara to assist in the restructuring of companies debt, is considering its own debt restructuring.

- A** [7] The plaintiff in this case now claims:
- (a) outstanding amount of RM1,213,493.59 as at 7 February 2013 for BA;
 - (b) interest at 3.5%pa on base lending rate ('BLR') of 6.60%pa on the above amount from 8 February 2013 until full and final settlement;
- B**
- (c) outstanding amount of RM433,455.03 as at 7 February 2013 for TR;
 - (d) interest at 1.25%pa on base lending rate ('BLR') of 6.60%pa on the above amount from 8 February 2013 until full and final settlement;
- C**
- (e) default rate of 1%pa above the prescribed rate the same amount from 8 February 2013 until full and final settlement; and
 - (f) cost for the action.

- D** [8] The demand sum is similar in the statement of claim as in the letter of demand dated 13 February 2013.

- E** [9] Also provided by the plaintiff to this court is the certificate of indebtedness showing similar outstanding sum as in the statement of claim that is owed by the defendants.

THE PLAINTIFF AND THE DEFENDANTS SUBMISSION

- F** [10] The plaintiff submits that the agreements signed by the defendants on the facilities given including the guarantees and the reply by the defendants to the letters of demand not disputing the same as well as the lack of credible defence, all show that summary judgment should be entered against the defendants.

- G** [11] The defendants in turn submit there are triable issues for trial to proceed with the calling of witnesses and this case is not suitable for summary judgment as:

- H**
- (a) CDRC is in the midst of looking into the first defendant's debt restructuring;
 - (b) the facilities were changed to another type of facilities namely 'short term facility' unilaterally by the plaintiff and therefore without the consent of the defendants;
- I**
- (c) there is no explanation in the letters of demand as to how the outstanding amount had accrued; and
 - (d) there is no consideration when the second defendant became guarantor.

THE LAW AND FINDINGS OF THE COURT

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[12] The Court of Appeal in *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357; [2003] 4 CLJ 294 quoted with approval the case of *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995 on the principle that intention of the parties are to be found in the written contract itself and when the contract is plain in meaning, the effect of the words in the same must be recognised.

B

[13] Following the above case and perusing the agreements between the parties here, especially the relevant clauses to the same as highlighted earlier, it is the finding of the court that the terms in the agreements are clear and therefore the defendants must bear the consequences and effect of those agreements.

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[14] The agreements signed and agreed by both parties clearly stipulate the defendants obligations in meeting the demands made by the plaintiff for the facilities that had been provided.

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[15] Further, Court of Appeal in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 297 followed the decision of *Dawson's Bank Ltd v Nippon Menkwa Kabushiki Kaisha* 62 1A 100 where Lord Russell of Kilowen said:

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Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by prevBoustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 297 followed the decision of Dawson's Bank Ltd v Nippon Menkwa Kabushiki Kaisha LR 62 1A 100enting a defendant from denying the existence of some fact essential to establish the cause of action.

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[16] Applying the above authority to the facts in this case too, the court agrees that the defendants are estopped to deny the claim of the plaintiff as it is the finding of this court that the defendants had failed to dispute the two demand letters that were sent.

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[17] This is because the court after having viewed its letter dated 4 February 2013 responding to the demand by the plaintiff, concluded that the defendants did not at all dispute the demand but only state that its case is being referred to CDRC and request the plaintiff to hold off legal action.

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[18] Also relevant to note is the Federal Court's case of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 where it is stated:

- A A certificate of indebtedness operates in the field of adjectival law, excusing the plaintiff from adducing the proof of debt and shifting the burden onto the defendant to disprove the amount claimed.
- B [19] Likewise in the application by the plaintiff for summary judgment here, the burden is shifted to the defendants to disprove the claim as the certificate of indebtedness has already been issued and in this regard, it is the finding of this court that the defendants had failed to prove that no outstanding amount is due as the defendants had not disputed the two demand letters received from the plaintiff.
- C [20] Further this court will always be guided by the often quoted Supreme Court's case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 14 on the law regarding considerations that need to be taken into account for application for summary judgment under O 14 where Mohd Azmi SCJ (as he then was) said:
- D In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence not only has raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking for the Privy Council in *Eng Mee yong & Ors v V Letchumanan* had this to say at p 217:
- E Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in it may be.
- F Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.
- G Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially under an O 14 application. Thus, apart from indentifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
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Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal points is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment, merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand' (see *Cow v Casey*; and *European Asian Bank AG v Punjab & Sind Bank* at p 516).

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[21] Also to be noted is that while the defendants assert that there are no outstanding payments due to the plaintiffs for the facilities granted, the defendants had also maintained that the debt due is being taken over by CDRC as seen in para 8 defendants affidavit which says:

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... 'Corporate Debt Restructuring Committee' telah bersetuju untuk mengambil kes Defendan-Defendan berhubung pinjaman disini ...

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[22] That in itself is contradictory for the defendants to say as the court is of the view if indeed there is no outstanding amount due, it would not be necessary for the CDRC to take a role in trying to resolve the issue of debt for the defendants.

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[23] In fact in the written submission of the defendants, it is again stated that the second defendant is undergoing debt restructuring by CDRC.

F

[24] The defendants letter dated 4 February 2013 not disputing the demand and the admission that the defendants are attempting to restructure its debts, again are clear indication to the court that the defendants do not have any credible defence to the claim by the plaintiff and no triable issues could be discerned in this case.

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[25] It is also the finding of this court that the assertion of the defendants that the types of facilities were unilaterally changed by the plaintiff is an afterthought to create issues for trial as the letter sent by the plaintiff dated 30 January 2012 informing the same to the defendants, came about a year before the first demand letter dated 23 January 2013 was sent by the plaintiff.

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[26] Yet the defendants did not reply to that letter dated 30 January 2013 from the plaintiff and when both demand letters were sent, dated 23 January 2013 and 13 February 2013, the defendants chose to remain silent and not raise this issue but instead responded by sending a single letter dated 4 February 2013 pleading for legal action to be staved off as the debt restructuring is on going.

I

A [27] This sequence of events again is proof that the defendants do not have real defence nor triable issues for this case to go to trial.

B [28] In any event there is no evidence that the type of facilities were indeed changed as the letter of demands did not refer to the facilities being change to 'short term facility' as alleged by the defendants and this court agrees with the plaintiff that since the defendants did not consent to the same, the type of facilities were never changed as shown by contemporaneous documents.

C [29] The defendants also contended there is no consideration given for the guarantees by the second defendant but the court is of the finding that the consideration given for the second defendant to be guarantor are the facilities provided for by the plaintiff and the second defendant can never deny being guarantor for the facilities as it had signed and agreed to two irrevocable and unconditional guarantees dated 25 January 2003 and 9 April 2007 as seen in
D exh 'CLML2' the plaintiff's affidavit in support.

E [30] Looking at the two demand letters, the court's finding is that the explanation as to how the outstanding amount has accrued is sufficiently stated in that letters and in the case of the letter of demand dated 13 February 2013, the amount claim is similar to the amount in the statement of claim.

THE DECISION

F [31] Noting the facts and applying the law based on those facts as narrated above, as well as taking into account the findings of the court together with the submissions of the parties, it is my finding there are no triable issues raised by the defendants and therefore I would allow encl 7 for summary judgment and award costs of RM3,000 for the plaintiff.

G *Plaintiff's application allowed with costs of RM3,000.*

Reported by Ashgar Ali Ali Mohamed

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